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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 381

THE UNITED STATES OF AMERICA,
Petitioner,

vs.

AMERICAN SURETY COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE RESPONDENT.

HOMER CUMMINGS,
CARL MCFARLAND,
Counsel for Respondent.

Of Counsel:
MARK W. NORMAN,
STERLING M. WOOD.

PRESS OF JUDD & DETWEILER, INC., WASHINGTON, D. C.

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BRIEF FOR THE RESPONDENT.

OPINIONS BELOW.

The brief for the United States correctly states the proceedings below.

JURISDICTION.

The brief for the United States correctly states the jurisdiction of this Court.

QUESTIONS PRESENTED.

(1) Whether petitioner, as plaintiff in a suit for damages for alleged non-completion of a contract, is not required to show that the alleged completion which it claimed it was required to secure elsewhere was for the same work

required of the defendant's principal under the original contract.

(2) Whether—under a contract expressly providing that, "if the Government does not terminate the right of the contractor to proceed", he shall pay per diem damages "for each calendar day of delay until the work is completed"—a contractor may, nevertheless, where the Government does terminate his right to proceed, be held liable for per diem damages for the period from the date fixed for completion to the date of such termination.

CONTRACT PROVISIONS AND VALIDATING STATUTE.

Article 9 of contract here involved (R. 15-16):

> If the contractor * * * fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work * * * In such event, the Government may take over the work and prosecute the same to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. * * * If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event the actual damages for the delay will be impossible to determine and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the contractor and his sureties shall be liable for the amount thereof * * *.

Paragraph 5 of the specifications (R. 8):

> The contractor shall pay to the government the amount of Twenty-Five Dollars ($25.00) as fixed, agreed, and

liquidated damages for each calendar day's delay in the completion of the contract.

Statute validating liquidated damage stipulations:

> In all contracts entered into with the United States for the construction * * * of any public building or public work under the control of the Treasury Department,* a stipulation shall be inserted for liquidated damages for delay; and * * * such stipulation for liquidated damages shall be conclusive and binding upon all parties. [Sec. 21, Act of June 6, 1902, 32 Stat. 326, 40 U. S. C. § 269.]

STATEMENT.

The brief for the United States correctly sets forth facts of record.

SUMMARY OF ARGUMENT.

Petitioner has recovered excess costs and certain expenses occasioned by the delay. If in addition and despite a contrary construction running back at least forty-four years (26 Comp. Dec. 736, 737-738) contracting officers desire per diem damages, their remedy is to change the contract form as they are authorized to do. For two reasons petitioner should not now prevail:

I. Petitioner has failed to plead or prove, as required by the decisions of this Court and the Court of Claims, that the completion upon which it was insisting and which it was allegedly required to secure elsewhere was for the work required of defendant's principal under the contract.

II. The statute here involved validates "such stipulation" as the parties may make, but it does not supply contract provisions. The specifications of the contract here

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* The functions of the Public Buildings Branch of the Procurement Division of the Treasury Department were transferred to the Federal Works Agency pursuant to the Reorganization Act of 1939. See note 22 *infra*.

involved supply the rate, but not the application, of per diem damages. From the earliest times to date Government contracting officers have written different forms of contract, omitting per diem damages or making them variously applicable, and all present contracting regulations permit or require the elimination of such provisions. The Comptroller's rulings to the contrary are not consistent. Under Article 9 of the form here involved there are at least six delay situations—in one all parties agree that the per diem damages apply, in four they admittedly do not apply, and in the situation here presented all courts other than the trial court below have agreed that they do not apply. Petitioner's position is doubly inconsistent —for petitioner must construe away both the clause "if the Government does not terminate the right of the contractor to proceed" and other supporting language as well as the phrase "until the work is completed or accepted." The assumed facts and equities upon which petitioner bases its case are untenable in fact and, on the contrary, the equities lie with the respondent because petitioner, in reliance upon its reservation of right to judge the facts of compliance, has refused to show that the "completion" it insisted upon was for work required of respondent's principal and because by its own long delay petitioner has permitted a 20% penalty to accrue where it was required to, and could, mitigate the damages.

ARGUMENT.

This Court has not heretofore had presented to it the theory upon which this case was tried, and petitioner's brief on the merits treats of a suppositious case and imagined equities. [1]

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[1] Respondent may, in addition to supporting the grounds stated by the court below, insist upon matters overlooked or ignored by it. *United States* v. *American Ry. Exp. Co.*, 265 U. S. 425, 435; *Central Kentucky Nat. Gas Co.* v. *Railroad Commission of Kentucky*, 290 U. S. 264, 269, 275; *Langnes* v. *Green*, 282 U. S. 531, 539; *Story Parchment Co.* v. *Patterson Co.*, 282 U. S. 555, 560; *United States*

There are three types of damages in delay situations. Not only has the petitioner here recovered stipulated excess costs and expenses,[2] but it has been the sole judge of the facts as to what construction was required and, on that ground, has been permitted to refuse to plead or prove that its "completion" contract was for the same work specified under the original contract here sued upon.[3] Petitioner's present contention is that the recovery of excess costs is insufficient[4] and that proof of actual damage involves too great a burden.[5] If there were any such need,

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v. *Curtiss-Wright Corp.*, 299 U. S. 304, 330. And, if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason. *Stelos Co.* v. *Hosiery Motor-Mend Corp.*, 295 U. S. 237, 239; *Helvering* v. *Gowran*, 302 U. S. 238, 245.

[2] The contract expressly provides in Article 9 that, if the Federal Works Agency terminates for delay, it "may take over the work and prosecute the same to completion * * * and the * * * sureties shall be liable to the Government for any excess cost occasioned the Government thereby" (R. 16). The Government in this case sued to recover excess construction costs, engineering expenses, and inspection fees (Complaint, Par. IX, R. 6-7), proved the construction payments allowed by the trial court (R. 67-73), and received engineering and inspection expenses upon agreement of counsel in open court (R. 73-74).

[3] Article 15 of the contract provides that "all disputes concerning questions of fact * * * shall be decided by the contracting officer * * * whose decisions shall be final and conclusive upon the parties" (R. 19). Respondent contended below that the Government was required to show that the new contract under which the work was completed was the same as the one upon which the Government was predicating liability. However, the Government contended, and the court below held, that the decision of the contracting officer, under the above-quoted provision, was conclusive (R. 97). *Merrill-Ruckgaber Co.* v. *United States*, 241 U. S. 387, 393.

[4] Petitioner's position is that recovery of excess costs "still leaves the Government uncompensated" for the delay (Br. 25-26). It intimates that it has been deprived of the use of the building, which is not shown to have been the fact here. It cites a supposed "recent trend * * * to allow both excess cost and liquidated damages for delay" in non-federal contract cases, but those situations are governed by the terms of the individual contracts involved.

[5] Petitioner's complaint is that it is "put to the burden of proving the actual damages" (Br. 23). But the applicable rule "is not changed by the difficulty suggested that it might be impracticable to prove actual damages." *United States* v. *United Engineering Co.*, 234 U. S. 236, 243. It mentions that, as is not shown to be the case here, it may for the period of delay lose the use of the building (Br. 17, 26); but then its measure of actual damage is clearly the rental value or the cost of substituted facilities. 18 Comp. Gen. 483. While petitioner here seeks per diem damages, it is of course obvious that in another case such liquidated damages may be insufficient and actual damages may be preferred (16 Comp. Gen. 277) as was the case in *Stone & Gravel Co.* v. *United States*, 234 U. S. 270, 279 *et seq.* See also *United States* v. *United Engineering Co.*, 234 U. S. 236, 242. Where the Government itself causes delay, it has allowed no such damages for the benefit of the contractor. *Cf. United States* v. *Rice*, 317 U. S. 61; *Wood* v. *United States*, 258 U. S. 120.

contracting officers—and not law or accounting officers—may supply the deficiency by a few strokes of the pen. They have deliberately chosen not to do so. Law, equity, and governmental practice all deny the claims now made by counsel for petitioner.

I. Petitioner failed to state or prove a cause of action because it failed to plead or show that the "completion" upon which it insisted was for work required under the contract with respondent's principal.

Petitioner as plaintiff in the trial court was required to show, as an indispensable part of its cause of action, that the completion upon which it was insisting was for the same work for which the original contractor and surety were bound.[6] Respondent made due objection.[7] The court below

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[6] As petitioner stated in its brief below, "the ordinary procedure is by comparing the specifications of the original contract, and the inventory of the state of work thereunder when the Government took over, with the specifications for completion" (Br. 37-38). See: *United States* v. *McMullen*, 222 U. S. 460, 472; *United States* v. *Axman*, 234 U. S. 36, 45; *United States* v. *Stone, Sand & Gravel Co.*, 177 F. 321, 326-327; *United States* v. *Perth Amboy Shipbuilding & E. Co.*, 137 F. 685; *United States* v. *Grosjean*, 184 F. 593, 595.

[7] In drawing its complaint, petitioner refrained from pleading the entire contract, omitting the all-important specifications (R. 9-22). But, since it relied upon one paragraph of the specifications for its claim of liquidated damages, it pleaded that paragraph alone in the body of its complaint (par. XI, R. 8). Respondent moved to strike the single paragraph so pleaded but the motion was denied (R. 27-29, 104-107). When the case came on for trial, respondent objected to the introduction of any evidence upon the ground that the complaint failed to state a claim "upon which any relief can be granted" (R. 34, 36). Respondent at the same time objected to the proof offered by the petitioner, on the ground that the new contract for the "completion" of the work was not shown to be "in accordance with the specifications and plans of [the original] Grogan contract" (R. 43), that "no proof or sufficient foundation has been laid or established that the Government was proposing [when it let the so-called contract for "completion"] to complete the Babb-Piegan Station in accordance with the plans and specifications and contract with Grogan" (R. 48), and that no foundation had been laid or proof made "that the work done, or the payment made for it was for the purpose of completing the Grogan contract in accordance with the plans and specifications * * * of the Grogan contract" (R. 67). Petitioner rested without proving more than the two contracts, without specifications, and the amounts paid or claimed, whereupon respondent moved to dismiss the suit upon the ground that "upon the facts and the law the plaintiff has shown no right to relief" (R. 74-75). Respondent, in its appeal to the court below, specified as error that the pleadings and evidence in no event warranted liquidated damages and that there was a complete failure of proof to support the judgment as a whole (R. 91).

considered the point so far as excess costs were concerned (R. 97), but not as bearing upon liability for per diem damages as well.

Petitioner as claimant had the burden, and respondent declined to assume it. Petitioner was in full possession of the evidence. "The Government must show that the work was done by another contractor under a contract and specifications which did not materially or substantially depart from the old contract and specifications." *California Bridge & Con. Co.* v. *United States*, 50 C. Cls. 40, 65, affirmed 245 U. S. 337, 344-345, on the ground that, in the absence of such showing, it would be "highly inequitable that the claim of liquidated damages should be allowed."[8] Subsequently, on the same ground, recovery by the contractor has been permitted as to retained percentages on a dam construction contract (*Pacific Coast Construction Co.* v. *United States*, 53 C. Cls. 582, 590)[9] and as to per diem dam-

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[8] As shown by the record in that proceeding, the contract read as follows: "12. *Deductions for delay.*—In case the completion of the work shall be delayed beyond the time fixed upon for the completion of the contract, deductions of $25 per day as liquidated damages during such delay may in the discretion of the Secretary of the Navy be made from the contract price of said work." (R. 9). That provision thus eliminated the question of construction here presented, because it provided, without reference to termination or non-termination, that per diem damages should accrue for delay "beyond the time fixed" and "during such delay". To the contractor's claim, the Government filed a counterclaim asking both excess costs and per diem damages—the latter being sought for three periods, from the agreed completion date to the end of an extension, from the latter date to the date the contract was annulled by the Government, and from the latter date to the date of actual completion by a successor contractor (R. 21). The Court of Claims rejected the counterclaim for per diem damages (R. 57-58), from which the United States took an appeal to this Court in which it argued for the allowance of the claimed per diem damages (Gov't Br. 6, 9-10) and claimed that there were no changes made in the relet contract sufficient to discharge the liability of the original contractor (*id.* 15-22). The plaintiff argued that the contracts were substantially different (Bridge Co. Br. 45-50).

[9] There the contract, as appears from the record in the Court of Claims, provided as follows: "21. *Delays.*— * * * In case the contractor should fail to complete the work in the time agreed upon in the contract, or in such extra time as may have been allowed for delays as herein provided, the engineer shall compute and appraise the direct damages for the loss sustained by the United States on account of further employment of engineers, inspectors, and other employees, including all disbursements on the engineering account, properly chargeable to the work. The amount so appraised and computed is hereby agreed upon as liquidated damages, and shall be deducted from any

ages claimed under a supply contract (*Patrick Carr and Sons* v. *United States*, 55 C. Cls. 7, 30-31).[10]

This salutary rule is particularly applicable where, as here, the contracting officers are the judges as to the facts of performance. Throughout its brief petitioner assumes that the contractor was responsible for the delay. Nowhere in the record is there any justification for such an assumption. The record is silent and, if petitioner is put to its proof or if this Court will take judicial notice of the official records, it will appear that petitioner was neither deprived of the use of the premises, since the building was substantially completed and actually occupied,[11] nor that its

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money due to the contractor under his contract, and the contractor and sureties shall be liable for any excess. * * *" (R. 43-44.) It should be noted that there the Government did not stipulate for per diem damages but merely for certain expenses. Also, in case the contract was terminated by the Government for delay, Article 22 provided that "any excess of cost arising therefrom over and above the contract price will be charged against the contractor and his sureties, who shall be liable therefor." (R. 44-45.) Upon the basis of the foregoing two provisions, the Government counterclaimed for some $40,000 liquidated damages and $315,000 excess costs (R. 40, 389).

[10] Here, as shown by the record in the Court of Claims, the contract provided that "one-tenth of one percentum of the contract price of such article shall be deducted for each day's delay, as liquidated damages for the delay, until satisfactory delivery or performance shall have been made, or until such time as the Panama Canal may reasonably procure a similar article elsewhere." (R. 14.) "In all cases where the Panama Canal, by reason of any default on the part of the Contractor, purchases similar articles elsewhere, the difference in costs, together with any additional expense incurred by the Panama Canal in replacing such articles, in addition to liquidated damages for delay until delivery of the articles purchased elsewhere is made, or until such time as, in the opinion of the General Purchasing Officer of the Panama Canal, such articles might reasonably have been delivered, may be collected by the Panama Canal from the Contractor or his sureties." (R. 14-15.) It should be noted that this form of contract eliminates the question of construction here presented, because it provides that the liquidated damages shall accrue "until satisfactory delivery or performance shall have been made, or until such time as the Panama Canal may reasonably procure a similar article elsewhere" and "until delivery of the articles purchased elsewhere is made * * * or * * * might reasonably have been delivered."

[11] The contract specifications and progress reports are matters of official record, of which it is submitted this Court may take judicial notice: *Jones* v. *United States*, 137 U. S. 202, 216; *Underhill* v. *Hernandez*, 168 U. S. 250, 253; *Fletcher* v. *Jones*, 105 F. 2d 58, 61-62, cert. denied 308 U. S. 555; *Red Canyon Sheep Co.* v. *Ickes*, 98 F. 2d 308, 312. Respondent's file contains progress reports showing 97% completion on September 1, 1932. In the following month completion was reported at 98.7%, and the time of completion was extended to November 14, 1932, indicating that there was about two weeks' work left to do. On the following February 2, 1933, the Treasury terminated the contract,

second contract was in fact one for the completion of the work required under the first.[12]

The record shows that, upon the amended contract price of $53,891.00 (R. 4, 77), the original contractor had been paid $49,602.50 (R. 74). Since there were charges of delay, the contracting officers were required to retain 10% of all progress payments, or $4,960.25, and the $49,602.50 figure must therefore represent but 90% of what had been done. Otherwise the contracting officers would under the contract have had to find, contrary to petitioner's contentions now, that "satisfactory progress is being made" (R. 20). Therefore, the original contractor must have done a total of $54,562.75 worth of officially approved work, whereas the total contract price including additions was only $53,891.00

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but the following May 19 the termination was revoked and the time for completion extended to June 18, 1933. On September 1, 1933, the Station was occupied. Two months later the Government representative prepared a list of claimed uncompleted items. The following spring a notice was received from the Treasury that it proposed to secure bids in June 1934 for completing the work, but it was not until July 20, 1934 that it terminated the Grogan contract and proceeded to secure the Lancaster contract.

[12] The specifications of the so-called "completion" contract, which the Government refused to plead or prove, required performance in 60 days (¶ 3). Only $10 a day liquidated damages were specified (¶ 4) as compared with the $25 per day in the original or Grogan contract (R. 8). The "completion" contract required such typical things as laying linoleum on certain floors (¶ 32-40) and raising the chimney of the janitor's cabin (¶ 41). Rough edges were to be removed in the boiler room wall (¶ 49), the concrete sill of the basement entrance door was to be repaired (¶ 50), a fuel feed groove in the basement floor was to be cleaned and filled (¶ 51), the basement floor was to be ground down to permit caps of fuel oil tanks to be sunk to floor level (¶ 51), some chinking in the log walls of the garage and other buildings was to be replaced (¶ 52), wood floors were to be cleaned and resurfaced (¶ 56), "rustic wood trim" was to be installed to cover outlet boxes of four office lighting fixtures (¶ 57), hardware was to be adjusted and one doorknob replaced (¶ 73), all walls were to be cleaned and repainted (¶ 78), weather stripping was to be installed (¶ 133), plated pipe and a tumbler and tooth brush holder were to be installed in the janitor's cabin (¶144, ¶145), the gasoline pump was to be adjusted (¶ 152), a scoop shovel was to be furnished (¶ 153), nickel plated brass elbows were to be substituted for "unfinished" elbows in the fire hose racks (¶ 157), a steam trap was to be installed in the boiler room (¶ 158), certain electrical equipment was to be made automatic (¶ 159), electric storage batteries etc. were to be supplied (¶ 162), small maintenance tools were to be furnished (¶ 166); and the cause of faulty fuel supply for the electric plant was to be found and remedied by "the installation of * * * auxiliary piping and equipment * * * or other satisfactory method" (¶ 171).

(R. 4, 77).[13] This state of the record illustrates the necessity of the rule requiring the petitioner, as plaintiff or claimant, to show what completion it was insisting upon as a part of its case for per diem damages. Having failed to do so, it has failed to prove its cause of action.

II. The solely applicable per diem damage provision of the contract, by its express and unambiguous terms, does not apply in this case.

Petitioner's asserted basis of liability shifts from the statute, to the mere specifications, to the terms of the contract, and back to the statute again. Only the stipulation of the parties, as embodied in Article 9 of the contract, is here involved.

The statute.—The statute cited by the Government does not provide liquidated damages but merely validates stipulations of the parties therefor. Article 9 stipulates the recovery of the amount of excess costs incurred, plus certain other expenses, all of which have been recovered here and fully satisfy the statutory direction. The purpose of the statute, as its legislative history shows, was to avoid the rule which both authorized the disallowance of

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[13] Article 16 (b) of the contract provides that 10% "shall" be retained on all progress payments except that, as to the last 50% of the work if the contracting officer "finds that satisfactory progress is being made," progress payments may be made in full (R. 20). The 10% must be retained on the first half of performance in any event. Accordingly, 10% of half of the total contract price of $53,891.00 would be $2694.55 retained on completed work. If the latter figure is added to the total actual payments of $49,602.50, then $52,297.05 worth of work on the total contract for $53,891.00 must have been performed, leaving unperformed work in the amount of $1,593.95.

However, the case was apparently tried against the surety, the original contractor not appearing, on the theory that the original contractor had been paid in full for the work done. The difference between $53,891.00 and $49,602.50, or $4,288.50, was still unpaid on the original contract. Petitioner secured "completion" for $3,781.00 (R. 6, 73), to which were added engineering and travel expenses of $2,137.54 and $414.00 (R. 6, 7, 73-74), making a total of $6,332.54 from which was deducted the unexpended balance on the original contract ($4288.54) leaving excess costs charged in the sum of $2,044.04 (R. 81). But this latter figure involved costs other than the "completion" contract. The "completion" contract was for only $3,781.00 (R. 6, 73), or $507.54 less than the $4,288.54 unpaid on the original full contract price of $53,891.00 (R. 4, 77).

liquidated damages as forfeitures or required the claimant to prove that the liquidated damages bore some relation to actual damages.[14] The statute says only that "such stipulation" as the parties make shall prevail, and petitioner does not contend that the statute ties the hands of contracting officers.[15] The presently published instructions

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[14] The purpose of the statute is stated by the letter of the Secretary of the Treasury submitting it under date of February 3, 1902, printed in the committee report, and introduced in the record of the debate. His complaint was that, upon familiar principles of equity, stipulations entered by the contracting officers were rendered nugatory by "the attitude of the courts in favor of construing as penalties wherever possible all stipulations for liquidating damages." House Rep't No. 1794, 57th Cong., 1st Sess.; 35 Cong. Rec. 4835. The previous month this Court had stated that equity was "accustomed to relieve in cases of penalties annexed to bonds and other instruments, the design of which was to secure the due fulfillment of a principal obligation," acknowledged the rule to be that relief could be had in cases of "an excessive disproportion between the stipulated sum and the possible damages," and at least implied that parties were free to raise an "issue concerning a disproportion between the agreed and actual" damages involved. *Sun Printing & Publishing Assn.* v. *Moore*, 183 U. S. 642, 660, 672-673 (decided January 13, 1902). *United States* v. *Bethlehem Steel Co.*, 205 U. S. 105, 119. *Taylor* v. *Sandiford*, 7 Wheat. 13; *In re Gelino's*, 43 F. 2d 832, 51 F. 2d 875, cert. denied 284 U. S. 659. That rule is now embodied in the Restatement of Contracts, § 339.

Another purpose of the statute was, as it states, to permit the contracting officer "to remit the whole or any part of such damages as in his discretion may be just and equitable". 40 U. S. C. § 269. Prior and, despite the statute, subsequent rulings of the accounting officers have been to the contrary. 11 Comp. Dec. 113 and 394; 12 *id.* 466; 13 *id.* 322 and 853; 14 *id.* 237; 18 *id.* 786; 4 Comp. Gen. 306 and 578 at 581-582; 5 *id.* 750 and 767; 7 *id.* 594 at 599; 10 *id.* 433; 14 *id.* 468; 15 *id.* 533; 16 *id.* 918; 17 *id.* 354.

[15] The petitioner views the statute as one which "precludes any possibility of treating the damages as a penalty" (Br., p. 12). The Comptroller General has ruled that the statute "is directory and the failure to so stipulate does not nullify agreements fully performed, any failure to so provide being for correction by the Secretary of the Treasury or action by the Congress." *Liquidated Damages—Public Building Contracts*, 4 Comp. Gen. 58, 59. In *United States* v. *United Engineering Co.*, 234 U. S. 236, 242, this Court said of a supplemental contract for the construction of a pumping plant entered in 1903, and therefore involving contemporaneous administrative construction: "The Government required no stipulation * * * as to damages in a fixed and definite sum for failure to complete the work as required. Under such circumstances we think it must be content to recover such damages as it is able to prove were actually suffered." Current government contract practice, as set forth in point (1) *infra*, tends to eliminate stipulated day-by-day damages entirely from contract provisions. As set forth in point (2) *infra*, Article 9 itself admittedly does not cover all delay situations.

Where Congress has chosen to fix rigid liquidated damages for delay, as it has in the matter of certain aspects of supply contracts, it has done so specifically and in detail by statute (41 U. S. C. § 36). The older and still operative provision for liquidated damages in connection with naval contracts, apparently the only other statutory provision on the subject, leaves the "forfeiture" as "liquidated damages" to whatever is "specified in such contract" by the contracting officers (34 U. S. C. § 563, R. S. § 3720, 5 Stat. 617).

for the form of construction contract here involved expressly recognize that liquidated damages may be wholly waived "if time is not of the essence," in which case "so much of the language in Article 9 as relates to liquidated damages shall * * * be deleted" (41 C. F. R. §12.23, *Directions for Preparation of Contract*, ¶14, p. 19 [C. F. R. v. 10, p. 1333]). Neither the courts nor the accounting officers have construed the statute as supplying liquidated damages beyond the stipulations of the parties.[16] There is therefore no reason to conclude, as does petitioner at the end of its brief, either that "the statute would * * * fill any interstices in the liquidated damage clause in the present contract" (Br. 29) or that the statute "is a reliable guide to the interpretation of the liquidated damages clause" (Br. 30 n.). For the statute states its own rule of construction—that *"such stipulation"* shall be binding. Should any court supply what it felt the administrative officers should do would be a plain encroachment upon executive prerogative.

The logic of petitioner's position, as appears from its brief, is three-fold:

(1) A per diem damage provision must be included in all contracts;

(2) It must be applicable to every conceivable form of delay in every conceivable circumstance; and

(3) Whenever the contract language is insufficient to accomplish either of these requirements, the courts must supply the omission.

But petitioner is not consistent, for petitioner concedes that many delay situations are not covered, as set forth in subpoint (2) *infra*.

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[16] In *Robinson* v. *United States*, 261 U. S. 486, 488, this Court, speaking through Mr. Justice Brandeis, stated that the statute requires only that "some" provision for liquidated damages be inserted in contracts. See 4 Comp. Gen. 58, 59.

The specifications.—Petitioner's contention that the specifications may stand alone and thus broaden the application of per diem liquidated damages is obviously untenable. The contract specifications supply the rate, but not the application, of liquidated damages. The only reason for the specification here was that, the contract being a form, some supplementary document or blank was required for the insertion of the rate of liquidated damages. The contract shows on its face that the specification was intended merely to state the rate and not the application of the stipulation for per diem liquidated damages.[17] The directions for the preparation of construction contracts specifically indicate that the specifications are to supply only the rate.[18] The Government is mistaken in stating that paragraph 5 of the specifications "is a provision which was fashioned for the particular contract here involved and not a standard form provision prescribed for general use" (Br. p. 14), nor was it in any real sense—apart from the sum stated—"drafted particularly for the instant case" (Br. pp. 14-15); for Paragraph 5 of the specifications is merely a paraphrase of the standard "Directions for Preparation of Contract" (par. 14, R. 66; 41 C. F. R. § 12.23,

[17] Article 9 of the contract here involved, in the very sentence stipulating the situation in which per diem damages should apply, provides that the "liquidated damages for each calendar day" shall be in "the amount as set forth in the specifications or accompanying papers" (R. 16). Paragraph 5, therefore, does no more than fix that amount as $25.00 per day (complaint, par. XI, R. 8; answer, par. VII, R. 31). The Government concedes that they must be read in conjunction (Br., pp. 11, 14). This Court has held that Government contracts, in cases of conflict between contract terms and the specifications, must be read as a whole; and, if there were a real conflict, the contract would be void for uncertainty. *United States* v. *Ellicott*, 223 U. S. 524, 540-543.

[18] The directions for the preparation of construction contracts upon the form here involved specifically state that: "The specifications should include a paragraph stating the amount of liquidated damages that will be paid by the contractor for each calendar day of delay, as indicated in Article 9 of the contract" (R. 66). The instructions themselves, therefore, indicate that the specifications are to include no more than "the amount" or rate of per diem damages. They indicate, moreover, that such liquidated damages are to apply "as indicated in Article 9 of the contract". These instructions are standard (41 C. F. R. § 12.23, Directions for Preparation of Contract, ¶ 14, p. 19 [C. F. R. v. 10, p. 1333]).

Directions for Preparation of Contract, ¶ 14, p. 19 [C. F. R. v. 10, p. 1333]).[19] If there were merit in petitioner's reliance on the specification here, then it should have prevailed in the several situations set forth in subpoint (2) *infra* where it concedes that per diem damages do not apply.

The contract.—The issue here, therefore, involves only the construction of Article 9. Such a problem loses reality except as considered upon the background of administrative practice generally and under Article 9 specifically. General governmental practice tends to eliminate liquidated damage provisions entirely, and even the stipulated per diem damages stated in Article 9 concededly do not apply in most situations in which there is delay.

(1) **Contracting officers write different forms of contract provisions for per diem damages variously applicable as deemed appropriate, or more frequently limit or eliminate them entirely.**—There is apparently no published compilation of Government contract forms prior to the Code of Federal Regulations, and there are no fixed forms all agencies are required to follow.[20] Reference to the records of

[19] A somewhat stronger case, from the Government's standpoint, was presented in *Maryland Casualty Company* v. *United States*, 93 C. Cls. 247, 252, 254, in which the rate of per diem damages was specified in Article I of the contract itself rather than in the specifications. Article IX of the contract there was the same as Article 9 here. The Court of Claims held (pp. 252, 254): "Article I of the contract provided in general terms liquidated damages for delay in the completion of the contract at the rate of $35 per day for each calendar day after the time set for completion until the work should be completed and accepted. * * * We think that Article I and Article IX must be construed together. Article IX being the specific provision should be controlling." *A fortiori*, here, where the rate is specified not in the contract but in the specifications, the terms of the contract proper must be controlling.

[20] At some period during the 1920s there was apparently an inter-departmental Board of Contract Adjustment, which is said to have collected contract forms. During the same period, the Bureau of the Budget undertook to issue, either with or without presidential approval or direction, certain forms. These were movements designed in part to secure uniform contracting practice, but it does not appear that anything more than a start was ever made and, since 1933, the several agencies have pursued independent courses and no attempt has been made by the Budget Bureau to require uniformity.

cases involving Government contracts indicates that almost every conceivable form of contract provision relating to delays and damages has been utilized and, where contracting officers have wished per diem damages to reach the situation here presented, they have chosen appropriate language therefor.[21]

The Federal Works Agency[22] form of liquidated damage provision for construction contracts is that of the instant contract (41 C. F. R. § 12.23). But the official instructions also permit changes in the form of "interlineations, dele-

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[21] See the provisions quoted or referred to in notes 8, 9, 10, and 15, and the references to regulations set forth in the text *infra*. The decision of the Comptroller General in 1924, reported in 3 Comp. Gen. 636, 637, sets forth a form of construction contract wherein it is expressly provided, unlike the present case, that in case of termination of the contract "any excess of cost resulting from such failure, including any charges on account of delay, shall be charged to the contractor"; and the charges were therein defined as $150 for every working day. Another form found in the reported decisions states that, "No delay shall be charged against the contractor where the head of the department or independent establishment certifies that such delay has caused no damage to the United States." 5 Comp. Gen. 363; 7 Comp. Gen. 595, 598. Still another form, which expressly eliminates the question here raised by petitioner, provides that liquidated damages shall apply "for each calendar day's delay until the work is satisfactorily completed or until such time as the United States may reasonably procure the completion of the work by another contractor or complete the work itself." 7 Comp. Gen. 595, 597; 8 Comp. Gen. 530 (1929). In *Wise* v. *United States*, 249 U. S. 361, 364, the contract provided liquidated damages "for each and every day during the continuance of such delay and until such work shall be completed." In *Graham* v. *United States*, 231 U. S. 474, 476, the situation here presented was before this Court but the contract contained no stipulation for damages other than excess costs. Only excess costs were provided for in the rivers-and-harbors contract involved in *Midland Land & Improvement Co.* v. *United States*, 58 C. Cls. 671, 672, aff'd 270 U. S. 251. In *Maryland Steel Co.* v. *United States*, 235 U. S. 451, 458, this Court held that a contracting officer might waive time for performance and, with it, liquidated damages if he deemed "performance within the stipulated time • • • unimportant." In *Maxwell* v. *United States*, 3 F. 2d 906, there was involved a Treasury Department contract providing for per diem damages "for each and every day the party of the second part shall be in default" (R. 135) and also that the Government might terminate the contract for delay "in which event" the contractor should "be liable for any damage incurred through such default" (R. 161). These provisions are not as limited to those of Article 9. The contractor continued working after the date for completion, but thereafter the Department terminated the contract. However, the Government claimed only excess costs. R. 18, 3 F. 2d at 908, aff'd per curiam 271 U. S. 647.

[22] The Act of June 6, 1902, 40 U. S. C. § 269, applied only to the Treasury Department. Reorganization Plan No. 1, pursuant to the Reorganization Act of 1939, transferred the functions of the Public Buildings Branch of the Procurement Division of the Treasury to the Federal Works Agency. 5 U. S. C. § 133 t, n.

tions, additions, or other alterations" (41 C. F. R. § 12.23, *Directions for Preparation of Contract*, ¶ 2 p. 18 and ¶ 14 p. 19 [C. F. R. v. 10, pp. 1332 and 1333]). The published instruction forms also clearly indicate that the liquidated damage provision may be deleted entirely (*id.*, ¶ 14). The current form of supply contract of the same agency provides for the recovery only of excess costs and not for additional stipulated per diem damages in cases of delay (Article 5, 41 C. F. R. § 12.32). The *Directions for Preparation of Contract* provide a substitute provision for liquidated damages for each calendar day of delay for use "if it is deemed necessary" (41 C. F. R. § 12.32, ¶ 5, p. 36 [C. F. R. v. 10, p. 1350]). In such contracts the forms provide for both termination and the recovery of excess costs (*id.*, Articles 4 and 5). Unlike the construction contract form, the supply contract form provides not only for termination but for the application of liquidated per diem damages, where deemed necessary, "accruing until such time as the Government may reasonably procure similar material or supplies elsewhere" (41 C. F. R. § 12.32, *Directions for Preparation of Contract*, ¶ 5, p. 36 [C. F. R. v. 10, p. 1350]), which thus expressly provides what the Government urges this Court to supply by implication in this case.

The War Department [23] regulations regarding contracts anticipate that special conditions may be added (10 C. F. R. § 81.16(a)). Liquidated damage clauses, in addition to stipulations for recovery of excess costs, are to be included only in cases in which "it is determined * * * that the Government would be damaged in case of delay in performance" and "such a clause will not be included in an invitation for bids except in such cases" (10 C. F. R.

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[23] The Navy Department regulations do not set forth forms of contract. The instruction on cancellation does not mention liquidated damages or even excess costs (34 C. F. R. §8.1056), and the only instructions issued are those respecting excess costs (34 C. F. R. §8.1080(h)).

§ 81.16(c)). Both of these provisions were omitted in the revision of 1942 (7 F. R. 6098). The current and rapidly changing War Department regulations [24] relate to the procurement of anything other than real estate and include the procurement of construction work and rivers and harbors projects (10 C. F. R. § 81.108.1). The standard form of "Delays-Damages" provision prescribed does not include liquidated damages (10 C. F. R. § 81.352) and it is expressly required that "except with • • • permission • • • or in accordance with general instructions • • • no contract shall provide for liquidated damages in the event of default" (10 C. F. R. § 81.352-A).[25] The War Department form of lump-sum construction contract, otherwise patterned in part upon Article 9 of the contract form here involved, entirely omits provision for liquidated damages for delay (10 C. F. R. § 81.1302.9 [Form No. 2]), and the fixed-fee construction contract form contains no provision for liquidated damages (10 C. F. R. § 81.1303 [Form No. 3]). The form of Government-owned equipment rental agreement contains a stipulation only for certain costs (10 C. F. R. § 81.1314.10 [Form No. 14]). The form for architect-engineer services includes only a stipulation for payment of excess costs in case of termination (10 C. F. R. §81.1316.14 [Form No. 16]). The purchase order forms provide only for actual damages in case of delay (10 C. F. R. § 81.1317-A-A, ¶ 11 [Form No. 383]; 10 C. F. R. § 81.1317-B-2, ¶ 11 [Form No. 18]; and § 81.1317-C-2, ¶10 [Form No. 47]). The Ordnance Procurement Instructions relating to contracts provide a form of contract provision for "Delays

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[24] A convenient collection is the Commerce Clearing House *War Law Service, Government Contracts.*

[25] Liquidated damages, where inserted in contracts, may be released upon certain approvals (10 C. F. R. §81.308-E(1)). Forms include a provision that delays and damage articles of contracts shall be suspended in case of the general termination of war contracts (10 C. F. R. §81.324.1(b) [section (1) of form]). See Ordnance Procurement Instructions §3.236.1(c), §3.236.8, and §3.236.9.

—Damages" which includes excess costs but not liquidated damages (§ 3,123.1).

Petitioner, therefore, is in error in stating that Article 9 "appears in all Government construction contracts unless a deviation is authorized" (Br. 29 n. 20). Nor is there, as petitioner states, any showing of "consistent administrative application" (Br. 19). The Comptroller General does not prepare, approve, or otherwise supervise contract forms.[26] He is merely an independent accounting officer who undertakes to apply contract provisions in connection with audits or settlements of claims, often in opposition to the expressed desires of the responsible administrative officers.[27] So far as the comptrollers have passed upon the question, moreover, they have not been consistent.[28]

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[26] The Budget and Accounting Act, 1921, 42 Stat. 20, transferred to an independent Comptroller General the functions of the prior Comptroller of the Treasury "relating to keeping the personal ledger accounts of disbursing and collecting officers". Those functions were to be thereafter exercised, as the main purpose of the legislation, "without direction from any other officer." "The balances certified by the Comptroller General shall be final and conclusive upon the executive branch of the Government." 31 U. S. C. §44. The Comptroller General was to provide for the payment of claims "adjusted and settled in the General Accounting office" (31 U. S. C. §47). He was authorized to prescribe forms only for accounting and disbursing purposes (31 U. S. C. §§49-50).

[27] See Mansfield, *The Comptroller General* (Yale Press, 1939), pp. 2-3 and *passim*.

[28] The Comptroller of the Treasury, who preceded the Comptroller General, ruled in 1908 that, in case of failure of performance, "any provision for liquidated damages * * * can not be effective * * * to charge * * * additional damages beyond the difference in cost." 14 Comp. Dec. 733, 740-741. See also 18 Comp. Dec. 599, 602; 19 *id.* 278. In 1920 precisely the situation here presented was the subject of decision, and the Comptroller held that the annulment of the contract for delay eliminated day-rate liquidated damages otherwise accrued and applicable. 26 Comp. Dec. 736, 737-738.

Shortly after the creation of the General Accounting Office the Comptroller General, considering a contract of substantially the same substance as that here involved, ruled that "the contract clearly provides for liquidated damages in case the contractor is permitted to continue the work to completion as contemplated under the original contract. It further provides that the Government may, for certain causes, take the work out of the contractor's hands or affirmatively grant additional time for performance, in either of which events the liquidated damage provision would not apply." 2 Comp. Gen. 204, 207. In 1927, however, Comptroller General McCarl directed that "administrative or disbursing officers should not undertake to determine whether liquidated damages did or did not accrue * * * But in all cases * * * deduction of liquidated damages covering the entire period of delay, regardless of cause,

(2) **Admittedly, per diem damages for delay are not provided or claimed in several situations under the contract form here involved.**—Petitioner's basic position in this case is that per diem damage provisions must not only be included in all contracts but that they must cover every delay, including particularly that in the circumstances here involved. However, petitioner also admits that other delay situations need not be subject to per diem damages.

Under Article 9 of the form here involved there are at least six delay situations. In one all parties agree that per diem damages apply. In four, the Government does not claim that per diem damages apply. Only in the sixth situation, here presented, does the petitioner contest the established interpretation of the contract provision. The court below thus properly observed that (R. 96)—

> Under this contract not all inexcusable delays are made compensable by payment of the stipulated sum.

If delay must or should be covered by per diem liquidated damage clauses in construction contracts, wholesale revision of contract forms, including Article 9 of the instant form, would be required.

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should be proposed." 6 Comp. Gen. 650, 651. He also forbade administrative officers to grant extensions of time for the completion of contracts. 7 Comp. Gen. 505, 506; *id.*, 534, 536-537; 8 *id.*, 13, 14-15; *id.* 623, 624-625. But in 1928 he was still of the view that Article 9 "provides for the cancellation of a contract in event of default of a contractor or *for permitting the contractor to continue until performance has been completed*, with a charge for liquidated damages * * * The administrative authority is limited to either cancelling the contract for default * * * *or permitting the contractor to continue until performance has been completed* and reporting the facts of the delay to this office for consideration as to whether liquidated damages should or should not be charged under the contract." 8 Comp Gen. 13, 14-15, emphasis supplied.

His decisions dealing with the applicability of liquidated damages in cases of delay are reported at 7 Comp. Gen. 409; 8 *id.*, 266, 268, 270 and 318, 320; 12 *id.*, 507; 15 *id.*, 409 and 913. As set forth in Point II(2) *infra*, it is now conceded that the day-rate liquidated damages stated in Article 9 do not apply in four of the six possible delay situations. All have been adjudicated by the Court of Claims, from the decisions of which no appeal to this Court was ever attempted.

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The six situations arising under the presently involved form are as follows:

(a) *Termination prior to time for completion.*—"If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified," contracting officers may terminate the contract prior to time for completion; and, in such cases, the Government may recover any "excess cost" incurred in completion (R. 15-16) but does not claim and is not permitted per diem damages for such delay. *Firemen's Fund Indemnity Company* v. *United States*, 93 C. Cls. 138[29] Nonapplicability of per diem damages in this situation was conceded by the petitioner in the court below (Br. for Appellee, p. 15); and the petitioner now excludes this situation by confining the question to "wherever the Government permits the contractor to proceed beyond the stipulated completion date" (Br., p. 10). Petitioner expressly argues that "a contractor, of course, will not have to pay liquidated damages where the Government terminates his right to proceed prior to the stipulated completion date" (Br. 21) and seeks to explain this omission on the ground that any such situation "involves controversial issues of fact" (Br. 21, n.); but difficulties of proof are precisely what liquidated damages are for.

(b) *Termination for non-completion on day fixed for completion.*—If the Government terminates the contract on the day fixed for completion, it does not claim and is not

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[29] This decision was in accord with that of this Court, speaking through Mr. Justice Holmes, in *United States* v. *O'Brien*, 220 U. S. 321, 163 F. 1023, 159 F. 671, wherein it was held that recovery of excess costs could not be had on termination prior to the stipulated completion date. See also *Stone & Gravel Co.* v. *United States*, 234 U. S. 270. In those cases the contract forms differed greatly from that here involved, permitting forfeitures but not recovery of actual damages or excess costs on termination for delay.

permitted per diem damages for the delay. *Fidelity & Casualty Co.* v. *United States*, 81 C. Cls. 495. Petitioner accepted this distinction in the court below (Br. for Appellee, p. 26); and the Circuit Court of Appeals said (R. 96)—

> Where the contractor breaches his agreement to finish the work within a specified time and the Government declines to allow him to proceed beyond the completion date, vexatious delays resulting in the temporary loss of use of a needed structure inevitably ensue; but in such contingency the Government has limited itself to the recovery of excess costs plus such other damages * * * as are recoverable under general legal principles.

The contracting officers of the Federal Works Agency, however, have chosen not to draw a form which would apply day-rate liquidated damages in this situation.

(c) *Inability or refusal to proceed prior to or beyond date fixed for completion.*—If the contractor is unable or refuses to proceed prior to or beyond the completion date fixed, per diem damages have been held not collectible for the delay for the period from the specified completion date to the actual completion through another contractor or the surety. *Commercial Casualty Co.* v. *United States*, 83 C. Cls. 367; *American Employer's Ins. Co.* v. *United States*, 91 C. Cls. 231, 236, 238. Petitioner adopted this distinction in the court below (Br. for Appellee, p. 26).

(d) *Delayed completion by contractor.*—If, despite delay prior to the completion date or non-completion on the date fixed, the Federal Works Agency permits the contractor to proceed to completion with the contract, it may admittedly recover liquidated damages "for each calendar day of delay until the work is completed" (R. 16) by the contractor. All parties admit liability for per diem dam-

ages in this situation, for which the contract provision was obviously drawn.[30]

(e) *Period from termination for non-completion to actual date of completion.*—If the contractor is allowed to proceed after the date fixed for completion and the Federal Works Agency later terminates the contract for non-completion, no per diem damages are demanded for the period from the time of termination to the time of actual completion by someone else. In *Fidelity & Casualty Co.* v. *United States, supra,* per diem damages for the period following both the termination date and the completion date were disallowed; and the same result was reached in *Commercial Casualty Co.* v. *United States, supra,* and *Firemen's Fund Indemnity Company* v. *United States, supra.* In *American Employer's Ins. Co.* v. *United States, supra,* per diem damages from the date of termination to the date of actual completion were claimed but, before decision, the Government abandoned the claim (pp. 236, 238). In subsequent cases, including the present case, per diem damages have not been claimed for such periods.

(f) *Termination for non-completion after date fixed for completion.*—If the contractor is permitted to proceed after the date fixed for completion and the Federal Works Agency thereafter terminates the contract for non-completion, as in the instant case, petitioner now seeks to recover liquidated per diem rather than actual damages, in addition to excess costs, for the period from the stipulated completion date to the later date of termination of the contract. Where the question has been raised the courts, with the exception of the trial court below, have denied per diem damages in this situation. *Maryland Casualty Company* v. *United*

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[30] The contract provision is expressly applicable in this situation to "any separable part" of the work, and the liability has been so applied. *American Employer's Ins. Co.* v. *United States,* 91 C. Cls. 231.

States, 93 C. Cls. 247 (1941);[31] *United States* v. *Cunningham*, 125 F. 2d 28;[32] and *United States* v. *Maryland Casualty Co.*, 25 F. Supp. 778 (Me.).[33] In *United States* v. *Continental Casualty Co.*, 29 F. Supp. 298 (La.), the issue was not presented, presumably because of the trifling amount of liquidated damages involved.[34] In the instant

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[31] That case involved the same provision as the instant case. Three months after the date for completion the Government terminated the contract, the surety elected not to complete the work so that the United States was required to do so, and the Government deducted per diem damages for the period subsequent to the stipulated date for completion but prior to the date of termination of the contract. The Court of Claims, in allowing the surety to recover the sum so withheld, said (p. 254): "Article IX gives the Government the choice of permitting the contractor to continue and collecting $35 per day as liquidated damages for delay, or of pursuing the other course by taking over and finishing the work, and collecting the excess costs incurred in the completion of the contract. By its terms it does not give the Government the right to collect both. The defendant having exercised its right to terminate the contract and to proceed with its completion, it thereby waived its claim to liquidated damages." Two judges dissented (pp. 256-258). They were of opinion that the per diem damages should be allowed, and stated that the prior decisions of the Court of Claims did not involve situations in which the contractor was allowed to continue working beyond the completion date of the contract. Judge Whitaker was of opinion that "until the contract was terminated, this provision [for per diem damages] was operative." Judge Madden, who "would decide the case as Judge Whitaker has suggested in his dissenting opinion," felt that there was merit in the distinction and that, "if * * * the work is not allowed to remain in the hands of the contractor beyond the time agreed for completion, there is reason for not permitting the Government to claim liquidated damages for delay in completion." The inconsistency in the rule suggested by these dissenting judges is discussed in note 39 *infra*.

[32] There the Court of Appeals for the District of Columbia permitted recovery by the contractor of per diem damages withheld by the Government for the period between the stipulated completion date and the termination of the contract by the Government nearly two months later. Justices Groner, Miller, and Rutledge were unanimous on the issue here presented.

[33] This case arose under a somewhat different form of Government contract than that here involved. Article 4 of the contract provided for termination for delay and recovery of "excess" cost and other expenses occasioned the United States thereby. Article 5 provided for liquidated damages "for each and every day the contractor shall delay in the completion of this contract." The court held that the Government could not secure per diem damages for delayed performance under Article 5 where it had taken over under Article 4 which did not specify per diem damages but only excess cost and other expenses.

[34] The applicability of the contract provisions for liquidated damages was mentioned but not discussed, the surety defending on other grounds against "all and every liability to the United States" (p. 602). On appeal, 113 F. 2d 284, 285, it appeared that there was involved only "the sum of $620 as liquidated damages * * * for the delay * * * beyond the contract date down to the date of * * * bankruptcy" of the contractor, as compared with the contested sum of $26,154.70 excess cost claimed by the Government under Article 9. The liability for per diem damages was not argued

case the Circuit Court of Appeals for the Ninth Circuit disallowed recovery of per diem damages (136 F. 2d 437), reversing in that respect the two opinions of the trial court (29 F. Supp. 819 and 44 F. Supp. 871).

State and local government cases, and wholly private contract cases, involve contracts with different terms respecting delay or liquidated damages. None of them appears to involve the question presented here.[35]

(3) **The contract expressly states an alternative, conditions per diem damages upon non-termination, presents no ambiguity for construction, and renders petitioner's position doubly inconsistent.**—Article 9 presents a plain alternative:

> [1] "The Government may take over the work * * * and the contractor and his sureties shall be

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or discussed on the appeal, although the Circuit Court of Appeals expressly allowed $620 in per diem damages (p. 286). This Court denied certiorari. 311 U. S. 697, 729. The Court of Appeals for the District of Columbia, referring to this decision in a subsequent case, observed that the issue involved "does not seem to have been raised by the parties. The issue in the case was whether there was a contract between the United States and the contractor's surety, which had taken over the performance of the work. The surety claimed there was and that it had suffered damages by the refusal of the United States to make progress payments pursuant thereto. The case is, therefore, not helpful on the point in discussion here." *United States* v. *Cunningham*, cited in the text *supra*, p. 32. The Government here admits that "the precise questions here involved were not presented to the court" (Br. 25 n. 13).

[35] *City of Reading* v. *United States Fidelity & Guaranty Co.*, 19 F. Supp. 350 (Pa.), and *Southern Pac. Co.* v. *Globe Indemnity Co.*, 2 Cir., 21 F. 2d 288, were abandonment cases in which the terms of the contracts do not appear. *Six Companies* v. *Joint Highway Dist. No. 13*, 24 F. Supp. 346 (Calif.), involved a situation in which the plaintiff contractors suing to recover sums withheld as liquidated damages had attempted to rescind their contract on various grounds. The case is not in conflict with the federal rule because the contract expressly provided for liquidated damages "for each and every working day which may elapse between the limiting date as herein provided and the date of actual completion of the work," although the whole of the contract provision does not appear; and the Circuit Court of Appeals for the Ninth Circuit affirmed the decision (110 F. 2d 620), whereas under the different terms in the instant case it denied per diem damages (136 F. 2d 437). It was reversed by this Court in the *Six Companies* case, however, on the ground that the law of California, as declared by an intermediate state court of appeals to the effect that "the stipulation in the contract as to the amount of damages in case of delay in completion was not applicable to delay after the contractor had abandoned the work," was controlling. 311 U. S. 180.

liable to the Government for any excess cost * * *"; or

[2] "If the Government does not terminate the right of the contractor to proceed, * * * the contractor shall pay to the Government * * * liquidated damages for each calendar day of delay until the work is completed or accepted * * *".

Contracting officers may exercise the first alternative at any time—before, on, or after the termination date. The second alternative fixes a double condition precedent to liability for day-rate liquidated damages——

[1] "If the contractor * * * fails to complete said work within such time" and

[2] "If the Government does not terminate the right of the contractor to proceed."

The first of these conditions eliminates per diem damages in cases of termination prior to the date for completion. The second predicates such damages upon non-termination after the completion date.

The then responsible officers adopted these provisions for obvious reasons: Contractors will not, without compensation, assume the stipulated damages for both (a) excess costs whenever the contracting officers may choose to take over and (b) day-rate penalties. 15 Comp. Gen. 627. Those officers did not deem it wise or economical to require both. Secondly, the Agency is amply protected by its right to terminate before, on, or after the date fixed for completion. In return for the right to take over at any time, the Agency has found it wise to omit per diem damages in case it does take over. [36]

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[36] The several courts which have decided the question here presented, always contrary to the contention of petitioner except the trial court below, have emphasized different bases for decision. The view of the contract as an alternative was the ground of decision of the Court of Appeals for the Dis-

It is not for courts or accounting or law officers to remake so explicit a contract. There is room for construction only where a contract is ambiguous, but there is no ambiguity here because the contract expressly authorizes per diem damages only "if the Government does not terminate the right of the contractor to proceed" (R. 16).[37]

The "interpretation" contended for by petitioner admittedly "requires some implications from the express language" of the contract (Br. 29). It requires at least two plain departures. *First*, it must disregard the express condition to the effect that per diem damages shall apply only "if the Government does not terminate the right of the contractor to proceed" (R. 16). Petitioner *arguendo* attempts to substitute other language for the word "if";[38] but it wholly ignores the supporting phrases "in such event," "in which event," and "in lieu thereof"—all of which emphasize the absolute nature of the condition precedent to liability for per diem damages. *Secondly*,

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trict of Columbia in *United States* v. *Cunningham*, 125 F.2d 28, 31. The court below, on the other hand, rested decision on the plainly stated condition precedent to the second alternative expressed in the contract (R. 96-97). The alternative form of contract has been used on occasion for at least 35 years. *Carnegie Steel Co.* v. *United States*, 240 U. S. 156, 161.

[37] The Government first assumes that the contract provision "is ambiguous" (Br. 17), asks judicial relief for what it asserts to be "unintentional ambiguities in language" (Br. 20), and insists that "a provision so cloudy in meaning" must be construed to favor the public interest (Br. 23). To this conclusion, in addition to the unwarranted assumption that there is any ambiguity, there are two answers: There is no rule requiring that contracts be fashioned to the views of law or accounting officers. §236(f) of the Restatement of Contracts, to which petitioner cites as its sole authority (B. 23), is applicable only where "the ordinary meaning of the language" does not determine the question; for §236 is expressly applicable to situations in which meaning "remains uncertain after the application of the standards of interpretation stated in * * * §235." Indeed, if any rule of interpretation is warranted here, it is that of the same §236, applicable because the Government drew the contract, to the effect that, "Where words * * * bear more than one reasonable meaning an interpretation is preferred which operates more strongly against the party from whom they proceed * * *." (Subsection (d).) See to the same effect Williston, *Contracts*, Rev. Ed., § 621. Moreover, § 339 of the Restatement assimilates liquidated damages to actual damages.

[38] This it does by putting unuttered words in the mouth of the court below, and then arguing them down. It states that the court below read the provision "as though" it provides "if the Government *never* terminates" (Br. 16), whereas the court below read and stated the provision as written by the parties. Then

should appropriate language be substituted for the word "if" as petitioner asks, the revised language would still be inconsistent since the remainder of the same sentence as presently written provides that liquidated damages shall be paid "for each calendar day of delay *until the work is completed or accepted*" (R. 16). Thus, under petitioner's contention, "there is a date from which, but no date to which the per diem damages can be calculated." *United States* v. *Maryland Casualty Co.*, 25 F. Supp. 778, 780. Petitioner recognizes this inconsistency and seeks to explain it away on the ground that the phrase "until the work is completed or accepted" means "merely the ultimate date of the contractor's liability" and is "not definitive" (R. 18, 17-19). This argument patently ignores the meaning of the provision, for it has no other purpose than to define precisely both the event and the extent of liability for liquidated damages.[39]

Petitioner asks that some language be extended and some be ignored. Of course in its attempted substitution of the indecisive phrase "so long as" and its ignoring of the phrase "until the work is completed or accepted" petitioner is attempting to hold necessary changes in language down to a minimum. But what it really requires to make its interpretation prevail is the entire rewriting of the provision.

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it states that the fictitious interpolation of the word "never" is "no more compelling" than the Government's substitution of the phrase "*so long as*" in place of the word "if" (Br. 16, 30). Apart from the plain admission thereby that petitioner seeks to redraft the provision in its own favor, even the phrase "so long as" does not avoid the impediment in petitioner's way, because "so long as" may mean nothing different than "if".

[39] One of the two dissenting judges in *Maryland Casualty Company* v. *United States*, 93 C. Cls. 247, 256-258, upon whose reasoning petitioner's brief relies (Br. 22, 23, 25, 28), ignored this inconsistency and the other, Judge Madden, sought to justify the elimination of the period after termination from the computation of liquidated damages on the ground of the difficulties of the "inquiry" which would have to be made in such a case. But the very purpose of liquidated damages is to avoid the necessity for any inquiry and to impose a rule of decision requiring only simple arithmetic. There is no reason to cite the difficulties of proof as a reason for not applying a rule of liquidated damages, for those difficulties are precisely the reason why parties do sometimes stipulate for liquidated damages.

(4) The assumed facts and equities upon which the petitioner bases its case are untenable.—Interspersed in its arguments respecting the interpretation of the contract terms are a number of assumptions of fact and assertions of equity. These are untenable not only in themselves but upon the background of the powers and remedies of the Federal Works Agency under the contract.

The Federal Works Agency, in writing its own contract (R. 9-22), reserved to itself conclusive decision as to discrepancies in the terms and specifications (Art. 2), controversies over changes and increased expense incident thereto (Art. 3), the finding of and changes respecting changed conditions (Art. 4), charges for extra work or material (Art. 5), determination of rejections and replacements as well as the costs thereof (Art. 6), the determination of the quality of materials (Art. 7), the dismissal of employees (Art. 7), the character of superintendence (Art. 8), the termination of the contract at any time for delay (Art. 9), the letting of other conflicting contracts at the site (Art. 13), determination of all disputes of fact (Art. 15), and the amount of progress payments (Art. 16) in which connection the Agency could always retain ten percent and, before final settlement, could demand a release of all claims against the Government (Art. 16). At any time the Agency may call for additional security (Art. 17).

The petitioner's asserted equities are to be judged not merely from the standpoint of the rights of the contractor but with regard for the extensive and intensive control exercised by the Federal Works Agency during all stages of the performance of the contract. Petitioner makes two arguments:

(1) Petitioner asserts that the presently settled construction, disallowing per diem damages in a case in which the Agency at any time terminates the contract, places it

in the power of the contractor to procrastinate and so "provoke" the Agency to terminate the contract.[40] This argument ignores realities and the terms of the contract.

The Agency has expressly reserved the right to terminate the contract for delay before, upon, or after the date fixed for completion; and it has a responsibility as well as a right in such cases. As stated by Mr. Justice Holmes in a somewhat similar case, "the right to terminate • • • is the protection expressly stipulated by the United States." *United States* v. *O'Brien*, 220 U. S. 321, 327.

Delay which does not result in immediate termination of the contract is costly to the contractor—independently of either per diem damages, stipulated excess costs, or actual damages he may have to pay—because he must continue the work longer for no greater compensation. Progress payments to him and ten percent of the entire compensation are withheld (Art. 16, R. 19-21). "Provision for monthly payments • • • and therefore of course giving little pay for little work, is the protection expressly stipulated by the United States." *United States* v. *O'Brien, supra.* He is charged with the expense of rejections and replacements (Art. 6, R. 12-14). He is in trouble with the contracting officers, who are the conclusive judges of all issues of fact (Art. 15, R. 19; and see Arts. 2 through 9, R. 10-17). He

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[40] Petitioner states that delays, asserted to be of frequent occurrence (Br. 20-21), may be long (Br. 16, 19), that the presently established construction leaves it to the contractor to prevent the collection of per diem damages by prolonging delay and thus "provoking the Government into a termination of his right to proceed", or by "abandoning the work" (Br. 21), that the contractor is thus permitted to "elect the damages he shall pay" (Br. 22), that the Agency is thus forced to abide the delay unless it "forfeit" its right to per diem damages (Br. 23, 27-28), that the contractor is thus given a "preference" despite his default (Br. 24), and that such law leaves the Agency "no other safe remedy at the stipulated completion date" than the termination of the contract (Br. 30).

Petitioner's suggestion that the contractor may abandon the contract is wholly gratuitous here. No abandonment was charged in this case. The contract provision does not recognize abandonment as cutting off the liability, for it expressly provides that, in the case of delays beyond the fixed completion date in which the Agency does not terminate the contract "the contractor shall continue the work" (R. 16).

faces the possibility that the Agency may in its discretion terminate the contract and subject him to the excess costs for completion the scope of which is reserved to the conclusive determination of the contracting officers (Arts. 9 and 15). The longer he delays, the deeper he becomes involved.

As the court below held, bad faith may not be assumed in the contracting officers for their non-acceptance of the work (R. 97). Nor, as the Court of Claims speaking through Judge Jones has held in the situation here presented, may bad faith be assumed as to the contractor's efforts to satisfy:

> It might be said just as logically that the Government might by delay * * * collect the entire amount of the contract in liquidated damages. Both of these propositions assume bad faith. No bad faith is alleged here. (*Maryland Casualty Company* v. *United States*, 93 C. Cls. 247, 255.)

The Agency is no more without a remedy in this situation than in other situations where, admittedly, per diem damages do not apply despite the provisions of Article 9. Nor is the Agency in any position inferior to that of the Government under current and more important War Department contracts wherein liquidated damage provisions are the exception.

(2) Secondly, petitioner argues that it is "fair" to assess per diem damages for delay *pro tanto* and irrespective of the termination of the contract in cases in which the contractor is permitted to proceed beyond the date fixed for completion since, it is said, it is within the contractor's power "by appropriate diligence" to avoid or lessen the damages payable (Br. 23-24) and otherwise the application of the contract leaves "uncompensated injuries" (Br. 25).

But the contractor has every reason to exercise "appropriate diligence" irrespective of per diem damages. The delay is no more uncompensated than in the several other situations where admittedly per diem damages do not apply under Article 9 or are not required at all under other forms. By its argument as to "fairness" the petitioner asks lawyers and courts to rewrite technical construction contracts which Congress has committed to an administrative agency and which that agency has negotiated. Moreover, if "fairness" is to be the test of construction of the contract, then mutuality is in order and liquidated damages should be applied for the benefit of the contractor where he, as is frequently the case, is delayed by the Government but is allowed no such recovery. *Cf.* 4 Comp. Gen. 404; 6 *id.* 255; *United States* v. *Rice*, 317 U. S. 61; *Wood* v. *United States*, 258 U. S. 120; *Wells Brothers Co.* v. *United States*, 254 U. S. 83; R. 20-21.

(5) **The equities lie with respondent.**—In two respects at least the equities, upon the record here, lie with the respondent. As set forth in Point I *supra*, petitioner in reliance upon its reservation of the right to judge the facts of compliance has refused to prove as a requisite part of its cause of action that the "completion" it insisted upon was for work required under the contract with respondent's principal.

Secondly, petitioner not only permitted long delays to continue but seeks, in addition to the excess costs and expenses it has recovered, a penalty amounting to 20% of the total contract price [41] and to nearly five times the amount

[41] Grogan was charged with 473 days delay when the time for completion was extended to June 20, 1933 (R. 5, 38). He did not meet the latter completion date—that is, to the satisfaction of the contracting officers—and more than another year was allowed to elapse before the contract was terminated by the contracting officers on July 20, 1934 (R. 5, 30-31). Thus, nearly two and a half years delay was allowed to occur, and a claim for nearly ten thousand dollars per diem damages was allowed to accumulate (R. 8, 81)

of excess costs and expenses charged to the original contractor for delay (R. 81). The party claiming damages must not permit them to accrue where they may be avoided,[42] as administrative officers have long recognized.[43] If allowed to so accrue, particularly where they involve slight breach or are not commensurate with actual damage, they are treated as void penalties.[44]

CONCLUSION.

If there were merit in petitioner's argument, a flick of the pen of contracting officers could correct it. There is, therefore, no cause to resort to construction or implication. As stated by Mr. Justice Holmes in a somewhat similar case,

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upon a contract for a total of only fifty thousand dollars (R. 4, 10, 74). The "completion" contract was dated a month after the termination of the Grogan contract and required completion in 60 days (R. 50). The record, therefore, shows that three months at the most were all that was required to advertise, let a contract, and achieve the construction the Federal Works Agency, as the sole judge of the facts, desired.

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[42] *Wicker* v. *Hoppock*, 6 Wall. 94, 99. "It was the duty of the plaintiff * * * to have subjected him to as little loss as practicable." *Telfner* v. *Russ*, 145 U. S. 522, 534, subsequent proceedings 162 U. S. 170, 166 U. S. 720. "The law required him to take that course by which he could secure himself with the least damage to the defendant." *Warren* v. *Stoddart*, 105 U. S. 224, 230. Other decisions to the same effect are legion.

[43] The War Department regulations, particularly important because of the great volume of river-and-harbor construction involved, significantly admonish its contracting officers at length to apply this rule in instances in which liquidated damages may accrue (10 C. F. R. § 81.19(e)). The latter was rescinded in 1942, 7 F. R. 6098. The current Ordnance Procurement Instructions (§ 3,502.1) state that: "It is not the policy of the Government to burden a contractor needlessly with large amounts of liquidated damages. Therefore, upon default under a contract containing any provision for liquidated damages, unless the default is likely to result in the judgment of the contracting officer in the imposition of comparatively small amounts of damages upon the contractor, the course of action * * * of permitting the contractor to continue performance under the contract and collecting liquidated damages from the contractor should not be pursued." For decisions of accounting officers to the same effect, see 11 Comp. Gen. 384; 20 Comp. Dec. 171, 179; *id.* 385, 390.

[44] 17 Comp. Gen. 827; 16 *id.* 344; 23 Comp. Dec. 71; 22 *id.* 256; 21 *id.* 36 and 377; 20 *id.* 16; 19 *id.* 20; 16 *id.* 490 and 772; 15 *id.* 388 and 701; 14 *id.* 203, 424, and 617; 13 *id.* 3; 11 *id.* 513. See also *Kothe* v. *R. C. Taylor Trust*, 280 U. S. 224, 226.

"if the United States wants more it must say so in plainer words." *United States* v. *O'Brien*, 220 U. S. 321, 327.

Respectfully submitted,

HOMER CUMMINGS,
CARL MCFARLAND,
Counsel for Respondent.

Of Counsel:
MARK W. NORMAN,
STERLING M. WOOD.

March 20, 1944.

SUPREME COURT OF THE UNITED STATES.

No. 381.—October Term, 1943.

The United States of America, Petitioner, *vs.* American Surety Company.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[April 24, 1944.]

Mr. Justice Murphy delivered the opinion of the Court.

On June 24, 1931, one John V. Grogan entered into a contract[1] with the United States to construct certain public buildings at the United States Inspection Station at Babb-Piegan, Montana. Respondent became the surety on Grogan's performance bond to the United States. The completion date of the contract was March 4, 1932, but this was extended to June 20, 1933. Grogan failed to complete the work by the extended date. The Government, however, allowed him to continue with the construction. On July 20, 1934, thirteen months later, the work was still uncompleted. Pursuant to its authority under Article 9 of the construction contract, the Government thereupon terminated Grogan's right to proceed with the work because of his continuing default. The Government finished the work through another contractor, expending $2,044.04 more than it would have been required to expend had Grogan completed the work.

The United States brought this suit in the District Court to recover the excess cost and also to recover liquidated damages of $9,875 for the delay occasioned by Grogan's default. The liquidated damages were computed on the basis of an agreed $25 per day for the 395 days between June 20, 1933, the extended date for completion, and July 20, 1934, when the contract right to proceed was terminated. Grogan was not served and never appeared. The District Court denied respondent's motion to strike from the complaint the paragraph alleging a right to liquidated

[1] The form of contract used was U. S. Standard Form No. 23 construction contract, approved by the President on November 19, 1926, and used between 1926 and 1935.

damages. *United States* v. *Grogan*, 39 F. Supp. 819. The court subsequently rendered judgment, after trial without a jury, for the United States for $2,044.04 as excess cost of completion and $9,875 as liquidated damages for delay. See *United States* v. *Grogan*, 44 F. Supp. 871. On appeal, the court below affirmed the judgment as to the excess cost but reversed as to the liquidated damages. *American Surety Co.* v. *United States*, 136 F. 2d 437. The public importance of the issue of the Government's right to liquidated damages under these circumstances led us to grant certiorari. 320 U. S. 729.

Section 21 of the Act of June 6, 1902,[2] provides that all contracts for the construction of any public building under the control of the Treasury Department shall contain a stipulation calling for liquidated damages for delay in completion of the work and that such stipulation shall be conclusive and binding upon all parties. Proof of actual damages is rendered unnecessary. This statute, however, does not purport to require liquidated damages to be paid in amounts or under circumstances beyond those stipulated by the parties. *Robinson* v. *United States*, 261 U. S. 486, 488. It was pursuant to this statutory command that Article 9 of the construction contract in issue was inserted. Thus this article is determinative of the Government's right to liquidated damages under the circumstances of this case.

Article 9, set out in the margin,[3] provides in effect that: (1)

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[2] C. 1036, 32 Stat. 310, 326; 40 U. S. C. § 269. This provides: "In all contracts entered into with the United States for the construction or repair of any public building or public work under the control of the Treasury Department, a stipulation shall be inserted for liquidated damages for delay; and the Secretary of the Treasury is authorized and empowered to remit the whole or any part of such damages as in his discretion may be just and equitable; and in all suits hereafter commenced on any such contracts or on any bond given in connection therewith it shall not be necessary for the United States, whether plaintiff or defendant, to prove actual or specific damages sustained by the Government by reason of delays, but such stipulation for liquidated damages shall be conclusive and binding upon all parties." See H. Rep. No. 1794, p. 8 (57th Cong., 1st Sess.); 35 Cong. Rec. 4935.

[3] "*Delays—Damages.*—If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in Article 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event, the Government may take over the work and prosecute the same to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take pos-

if the contractor refuses or fails to prosecute the work with proper diligence or to complete his work within the specified time, the Government may at any time terminate his right to proceed and prosecute the same to completion by contract or otherwise, in which case the Government may recover from the contractor or his surety any excess cost occasioned thereby; (2) "if the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event the actual damages for the delay will be impossible to determine and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted the amount set forth in the specifications." In this instance, paragraph 5 of the accompanying specifications provides that "the contractor shall pay to the government the amount of Twenty-Five Dollars ($25.00) as fixed, agreed, and liquidated damages for each calendar day's delay in the completion of the contract." This paragraph merely provides the agreed rate of the per diem liquidated damages to be paid in the situations contemplated by Article 9. It is obviously not intended to spell out the situations where liquidated damages are to be paid and cannot, contrary to the Government's contention, control the language of Article 9.[4]

The impact of Article 9 on the facts of this case is clear. The contractor having failed to complete his work within the specified time, the Government exercised its option under the first part of Article 9 to terminate his right to proceed. This power to terminate could be exercised before or on the stipulated completion date or, as in this case, at any date thereafter. The Government

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session of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event the actual damages for the delay will be impossible to determine and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the contractor and his sureties shall be liable for the amount thereof. . . ."

[4] The directions for the preparation of construction contracts upon the form here involved state that "The specifications should include a paragraph stating the amount of liquidated damages that will be paid by the contractor for each calendar day of delay, as indicated in Article 9 of the contract." It was pursuant to this direction that paragraph 5 of the specifications in the instant case was inserted. This instruction indicates that the specifications are to include no more than "the amount" or rate of per diem damages that are to be applied "as indicated in Article 9 of the contract."

then made other arrangements to complete the construction work and was entitled to, and did recover, the excess cost occasioned thereby. It thus waived its right to liquidated damages under the second part of Article 9. That right is conditioned upon the Government not terminating the contractor's right to proceed. Where there is such a termination, even though it be subsequent to the stipulated completion date, the right to liquidated damages disappears. Such has been the uniform and correct result heretofore reached in the application of this type of contract provision. See *United States* v. *Cunningham,* 125 F. 2d 28; *United States* v. *Maryland Casualty Co.,* 25 F. Supp. 778; *Maryland Casualty Co.* v. *United States,* 93 Ct. Cls. 247. See also *Fidelity & Casualty Co. of N. Y.* v. *United States,* 81 Ct. Cls. 495; *Commercial Casualty Insurance Co.* v. *United States,* 83 Ct. Cls. 367; *American Employer's Insurance Co.* v. *United States,* 91 Ct. Cls. 231.

The Government has urged us to read the second part of Article 9 as though the right to liquidated damages were based, not upon a condition precedent that the Government not terminate, but upon a continuing condition, under which liquidated damages would accrue "so long as the Government does not terminate" the contractor's right to proceed. This is said to be the only way to give full effect to the prime purpose of Section 21 of the 1902 Act to eliminate the uncertainties and difficulties of establishing actual damages to the Government by delay in obtaining the use of a public building. Otherwise proof is required of actual damages for the delay where termination occurs before completion in the teeth of a statute which dispenses with such proof in suits on a construction contract containing a stipulation "for liquidated damages for delay." The Government also claims that failure to allow it liquidated damages under these circumstances leaves it entirely to the contractor whether liquidated damages will ever be paid since he can relieve himself of such liability at any time short of completion simply by abandoning the work or provoking the Government to terminate his right to proceed. The Government contracting officers in turn would be induced to allow the contractor to proceed to completion despite inexcusable delays so as not to forfeit mounting liquidated damages, thus precluding prompt completion and occupancy of needed structures.

But we are confronted here with an unambiguous contract that clearly limits the right to liquidated damages to situations where the Government does not at any time terminate the contractor's right to proceed. That it may be wiser to expand the right to such damages to every case of delay, regardless of whether there is a termination, is of course not relevant in interpreting and applying clear words of limitation in the contract. We find nothing, moreover, in Section 21 of the 1902 Act that fills in interstices deliberately left open by the parties. No statutory language or policy forbids the Government and a contractor from stipulating for liquidated damages in limited situations only. Indeed the statute makes any such stipulation "conclusive and binding upon all parties," thereby foreclosing the Government's right to object to its own failure to insist upon liquidated damages in other situations. Since we are not justified in rewriting the clear provisions of the contract to include what might well have been but was not inserted, the judgment below must be

Affirmed.